KIEW FOO MUI & 2 ORS.

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUCHING
TAN SRI DATO' EDGAR JOSEPH JR. FCJ
DATO' MOHAMED DZAIDDIN BIN HJ. ABDULLAH FCJ
TUAN GOPAL SRI RAM JCA
[CRIMINAL APPEAL NO. 05-31-94, 05-43-94 & 05-30-94]
15 NOVEMBER 1995

CRIMINAL LAW & PROCEDURE: *Murder - Trial with aid of assessors - Trial within a trial held in absence of assessors on admissibility of cautioned statements - Whether prosecution dutybound to recall and re-examine witnesses before assessors - Whether defence entitled to cross-examine witnesses - Duty of trial Judge - Omission to recall witnesses - Whether fatal - Whether a failure of justice - Criminal Procedure Code s. 422.*

EVIDENCE: *Trial with aid of assessors - Cautioned statements - Whether properly admitted - Cautioned statements admitted after a trial within a trial - Whether probative value of statements to be put to assessors - Evidence recorded during trial within a trial not given before assessors - Whether a misdirection.*

WORDS & PHRASES: *"Failure of Justice" - Section 422 CPC - Whether connoting a just decision and a fair trial.*

The appellants had been convicted of murder under s. 302 Penal Code read with s. 34 thereof after a trial before a Judge with the aid of assessors. There were no eyewitnesses to the alleged murder, and to prove their case, the prosecution was relying on circumstantial evidence and the cautioned statements of the appellants. At the trial below, after objection being taken to the admissibility of the cautioned statements, the Judge held a trial within a trial, in the absence of the assessors, to determine their admissibility. Thereupon the prosecution called a number of witnesses, and at the conclusion thereof the learned Judge ruled that the statements had been voluntarily made and hence admitted them. However, after the conclusion of the trial within a trial, the prosecution witnesses who had testified therein had not been recalled by the prosecution to repeat their testimony before the assessors at the trial proper. The defence thus had not been able to cross-examine these witnesses all over again on the issue of voluntariness. Likewise, the whole of the prosecution evidence which had been recorded during the trial within a trial had not been given before the assessors. In this appeal, the issue that arose was whether this omission to recall the witnesses constituted a serious misdirection as to justify the quashing of the convictions.

Held:

Per Edgar Joseph Jr. FCJ (delivering the judgment of the Court):

[1] It is clear law that if the challenge to the admissibility of a confession fails, the prosecution evidence of the confession and the circumstances in which it had been obtained will be given in the presence of the jury or the assessors, as the case may be. It is the duty of the prosecution to ensure that this is done. The failure of Counsel for the accused to apply to the Court for the recall of these witnesses after his challenge to admissibility has failed, could not and did not relieve the prosecution from the duty

of ensuring that these witnesses were recalled and examined in chief once again as to the circumstances in which the cautioned statements had been obtained, and of giving the defence the opportunity to cross examine all over again if they so wish.

[2] In the circumstances herein, the learned Judge was under an automatic duty to remind the prosecution of its duty to recall and re-examine the witnesses before the assessors, and the defence of their corresponding right to cross-examine those witnesses.

[3] In law the expression "justice" comprehends not merely a just decision but also a fair trial. In the instant case, the failure of the prosecution, the defence and the learned Judge to discharge their respective duties had occasioned a failure of justice. The omission to recall the prosecution witnesses who had testified during the trial within a trial to give evidence again before the assessors as to the way in which the cautioned statements had been obtained, had severed an important artery of evidence from the consideration of the assessors, thereby occasioning a failure of justice within the meaning of s. 422 Criminal Procedure Code, and, at the same time, rendering the convictions unsustainable.

[Convictions quashed. Appellants ordered to be retried before a different Judge and different assessors].

*[**Bahasa Malaysia** Translation of Headnotes]*

UNDANG-UNDANG & PROSEDUR JENAYAH: *Pembunuhan - Perbicaraan dengan bantuan pentaksir - Perbicaraan dalam perbicaraan diadakan dalam ketiadaan pentaksir mengenai kebolehterimaan pernyataan-pernyataan beramaran - Samada pendakwaan berkewajipan untuk memanggil semula atau memeriksa semula saksi-saksi di hadapan pentaksir - Samada pembelaan berhak untuk memeriksa-balas saksi-saksi - Kewajipan Hakim perbicaraan - Peninggalan untuk memanggil semula saksi-saksi - Samada memudaratkan - Samada kegagalan keadilan - Kanun Prosedur Jenayah s. 422.*

KETERANGAN*: Perbicaraan dengan bantuan pentaksir - Pernyataan beramaran - Samada diterima dengan betul - Pernyataan beramaran diterima selepas perbicaraan dalam perbicaraan - Samada nilai kebarangkalian pernyataan haruslah dikemukakan kepada pentaksir - Keterangan dicatatkan ketika perbicaraan dalam perbicaraan tidak dikemukakan di hadapan pentaksir - Samada suatu salah arahan.*

PERKATAAN & UNGKAPAN: *"Kegagalan keadilan" - Seksyen 422 Kanun Perosedur Jenayah - Samada memberikan erti suatu keputusan yang adil dan suatu perbicaraan yang saksama.*

Perayu telah disabitkan dengan kesalahan membunuh di bawah s. 302 Kanun Jenayah yang dibaca dengan s. 34 di situ selepas suatu perbicaraan dihadapan seorang Hakim dengan bantuan pentaksir. Tidak terdapat saksi yang melihat pembunuhan yang dikatakan itu, dan bagi membuktikan kes mereka, pendakwaan bergantung pada keterangan ikut keadaan dan pernyataan beramaran perayu-perayu. Di perbicaraan di bawah, selepas bantahan diambil mengenai keboleh-terimaan pernyataan-pernyataan beramaran, Hakim telah mengadakan perbicaraan dalam perbicaraan, dalam ketiadaan pentaksir, untuk menentukan keboleh-terimaan penyataan tersebut. Selepas itu pihak pendakwaan telah memanggil beberapa orang saksi, dan di peringkat penentuannya Hakim yang bijaksana telah memutuskan bahawa pernyataan-pernyataan tersebut telah dibuat secara sukarela dan dengan itu telah menerimanya. Walaubagaimanapun, selepas perbicaraan dalam perbicaraan tersebut, saksi-saksi pendakwaan

yang telah memberi keterangan di dalamnya telah tidak dipanggil semula oleh pendakwaan untuk mengulangi testimoni mereka di hadapan pentaksir di perbicaraan yang betul. Pihak pembelaan dengan itu tidak dapat memeriksa-balas saksi-saksi ini sekali lagi mengenai isu sukarela. Begitu juga, keseluruhan keterangan pendakwaan yang telah dicatatkan ketika perbicaraan dalam perbicaraan telah tidak dikemukakan di hadapan pentaksir. Dalam rayuan ini, isu yang berbangkit adalah sama ada peninggalan untuk memanggil semula saksi-saksi tersebut membentuk suatu salah arahan yang serius bagi mewajarkan sabitan tersebut dibatalkan.

Diputuskan:

Oleh Edgar Joseph Jr. HMP (menyampaikan penghakiman Mahkamah):

[1] Ianya terang mengikut undang-undang bahawa jika cabaran kepada keboleh-terimaan sesuatu pengakuan gagal, keterangan pendakwaan mengenai pengakuan tersebut dan keadaan dalam mana ianya diperolehi akan dikemukakan dalam kehadiran juri atau pentaksir-pentaksir, mengikut sepertimana keadaannya. Ianya merupakan tugas pihak pendakwaan bagi memastikan bahawa perkara ini dilakukan. Kegagalan Peguam bagi pihak tertuduh untuk memohon kepada Mahkamah bagi memanggil semula saksi-saksi ini selepas cabarannya kepada keboleh-terimaan tersebut gagal, tidak boleh dan tidak melepaskan pihak pendakwaan daripada tugas memastikan bahawa saksi-saksi ini dipanggil semula dan diperiksa secara utama sekali lagi mengenai keadaan dalam mana pernyataan-pernyataan beramaran tersebut telah diperolehi, dan memberikan pihak pembelaan peluang untuk memeriksa-balas sekali lagi jika mereka ingin melakukan demikian.

[2] Dalam keadaan di sini, Hakim yang bijaksana telah berada dalam kewajipan yang otomatik untuk mengingatkan pihak pendakwaan mengenai tugasnya untuk memanggil semula dan memeriksa-semula saksi-saksi tersebut di hadapan pentaksir dan mengingatkan pihak pembelaan mengenai hak mereka untuk memeriksa balas saksi-saksi itu.

[3] Di sisi undang-undang ungkapan "keadilan" meliputi bukan sahaja suatu keputusan yang adil tetapi juga suatu perbicaraan yang adil. Dalam kes ini, kegagalan pihak pendakwaan, pembelaan dan Hakim yang bijaksana untuk mengendalikan kewajipan-kewajipan mereka masing-masing telah menyebabkan kegagalan keadilan. Peninggalan untuk memanggil semula saksi-saksi pendakwaan yang telah memberi keterangan ketika perbicaraan dalam perbicaraan untuk memberikan keterangan sekali lagi dihadapan pentaksir mengenai cara dalam mana pernyataan-pernyataan beramaran tersebut telah diperolehi, telah mencantas saluran penting keterangan daripada mendapat pertimbangan pentaksir-pentaksir, yang mana telah menyebabkan kegagalan keadilan dalam maksud s. 422 Kanun Prosedur Jenayah dan pada masa yang sama juga, menjadikan sabitan-sabitan terhadap perayu tidak boleh dipertahankan.

[Sabitan-sabitan dibatalkan. Perayu diperintah supaya dibicara semula di hadapan Hakim yang lain dan juga pentaksir yang lain].

Cases referred to:
R. v. Murray 34 Cr. App. R. 203 ***(foll)***
Yaacob v. Public Prosecutor [1966] 1 MLJ 67 ***(foll)***
Prasad v. R. 72 Cr. App. R. 218 ***(foll)***
PP v. Mohamed Noor bin Jantan [1979] 2 MLJ 289 ***(refd)***
PP v. Lin Lian Chen [1992] 2 MLJ 561 ***(refd)***

Mraz v. The Queen [1955] 93 CLR 493 ***(foll)***
Krishna Murthy v. Abdul Subban [1965] 1 Cr. LL 565 ***(foll)***

Legislation referred to:
Criminal Appeal Act 1912 (NSW), s. 6(1)
Criminal Procedure Code s. 422
Criminal Procedure Code (India), s. 535(1)
Evidence Act s. 54
Penal Code ss. 34, 302

For the first appellant - Anthony Tai; M/s. Anthony Tai Advoc.
For the second appellant - JB Singh; M/s. JB Singh & Co. Advoc.
For the third appellant - Charles Kanavathi; M/s. Charles Kanavathi & Co. Advoc.
For the respondent - Abang Iskandar bin Abang Hashim, DPP

JUDGMENT

Edgar Joseph Jr. FCJ:

These appellants had been convicted upon a charge of murder in contravention of s. 302 of the Penal Code, read with s. 34 of the Penal Code, after a trial before a Judge with the aid of assessors. The first and third appellants were sentenced to death whilst the second appellant was sentenced to be detained during the pleasure of the Governor of Sabah, he being under the age of 18 years on the date of the alleged offence.

The case for the prosecution depended upon, a substantial body of circumstantial evidence and cautioned statements of each of the appellants, there being no eyewitness to the killing, but in the view we took of one of the grounds of appeal it is unnecessary for us to discuss the evidence.

Suffice it to say, that at the trial upon objection being taken to the admissibility of the cautioned statements, the learned trial Judge held a trial within a trial, in the absence of the assessors in order to determine their admissibility, and, at the conclusion thereof, he ruled that they had been freely and voluntarily made and therefore admissible.

During the trial within a trial, a number of witnessess were called by the prosecution for the purpose of establishing the voluntariness of the cautioned statements and these witnesses were cross-examined by the defence. All the appellants gave evidence, in the course of which, they had alleged that the cautioned statements had been made as a result of inducement, threats and assaults by persons in authority, which deprived the same of their voluntary character. Be that as it may, as we have already said, the trial Judge ruled in favour of the prosecution and admitted the cautioned statements in evidence, after which the assessors were recalled into Court and informed by the Judge of his ruling and the cautioned statements were then read in evidence.

Now, it is clear law that if the challenge to the admissibility of a confession fails, the prosecution evidence of the confession and circumstances in which it had been obtained will be given in the presence of the jury or the assessors as the case may be. It is the duty of the prosecution to ensure that this is done.

In this case, however, the prosecution witnesses who had testified during the trial within a trial as to the way in which the cautioned statements had been obtained from the appellants had **not** been recalled by the prosecution to ensure that they repeated that testimony before

the assessors, with the result that the defence had lost the opportunity to cross-examine these witnesses all over again on the issue of voluntariness. To be fair to the learned trial Judge, there is nothing in the record provided to show that any of the defence Counsel either reminded the prosecution of its duty to recall these witnesses nor applied to recall them for cross-examination, for this purpose.

When the defence was called, at the trial proper, the accused persons denied the charges and went on to testify as to the way in which the cautioned statements had been obtained from them, and the Judge was careful, in the course of his summing up, to advert to this part of the testimony of the accused persons and, to correctly point out to the assessors, that they were entitled to take this into account in assessing the weight and value of the cautioned statements. But, as we have already said, the prosecution evidence which had been recorded during the trial within a trial, that is to say, during the *voire dire*, to determine the admissibility of the cautioned statements and the circumstances in which they had been obtained, had not been given before the assessors. In these circumstances, the broad question for decision was whether this omission was so serious as to justify the quashing of the convictions.

In *R. v. Murray,* 34 Cr. App. R. 203) Lord Goddard, speaking for the Court of Criminal Appeal in England, said (at p. 207):

> Its weight [of the confession] and its value were for the jury, and in considering its weight and value the jury were entitled to form their opinion on the way in which it had been obtained.

And, a little later he added:

> This point, if there is any doubt about it, had better be settled once and for all. It has always, as far as this Court is aware, been the right of Counsel for the defence to cross-examine again the witnesses who have already given evidence in the absence of the jury, because if he can induce the jury to think that the confession has been obtained by some threat or promise or some means of that sort, then of course the value of the confession is enormously weakened. The weight of the evidence and the value of the evidence are always for the jury.

In *Yaacob v. Public Prosecutor* [1966] 1 MLJ 67 Thomson C.J. speaking for our then Federal Court, quoted with approval the above passages in the judgment of Lord Goddard.

To revert to the position in England, the case of *Prasad v. R.* 72 Cr. App. R. 218 shows that the jury should take into consideration all the circumstances in which a confession was made including allegations of force, if it considers they may be true, in assessing the weight and probative value of such a confession.

To return to *Yaacob*, we note that in that case, unlike the present case, Counsel for the accused **did**, after the challenge to admissibility of the confession had failed, apply to call the accused to give evidence as to the circumstances in which it was obtained, but, the application was refused. Furthermore, in *Yaacob*, unlike the present case, the jury were not told, that in considering the question whether the confession was true, they were entitled to their opinion as to the way in which the confession was taken.

Be that as it may, we were of the view, that it is not merely of some importance but of fundamental importance to the administration of criminal justice that the accused person should feel that he has had a fair trial. Can it be seriously contended that just because of the mistake or blunder on the part of his Counsel in omitting, after the challenge to

admissibility of the cautioned statements had failed to make application to the Court for the recall of the prosecution witnesses to cross-examine them all over again - this time before the assessors - the prosecution was relieved of its duty of ensuring that these witnesses were recalled and examined in chief, once again, as to the circumstances in which the cautioned statements had been obtained and the defence then being given the opportunity to cross-examine them all over again, if they so wished? The answer to this question must surely be "no" for, to hold to the contrary, would be to reverse the onus of proof, with regard to the cautioned statements, which at all times, lay upon the prosecution. Nor, for that matter, could there be a waiver by the defence of such requirement, unless the cautioned statement is exculpatory in nature and it is the defence, who seek its admission, in which case, no trial within a trial need be held at all. See *PP v. Mohamed Noor bin Jantan* [1979] 2 MLJ 289; *PP v. Lin Lian Chen* [1992] 2 MLJ 561.

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But, to return to the issue at hand, our enquiry had to be taken further, for we also had to consider what role (if any) the Judge had to play in the context thereof and it is this topic which we must now address.

Having regard to:

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(1) the failure of the prosecution in its duty to ensure, that once the challenge to the admissibility of the cautioned statements had failed, the entire evidence of the cautioned statements and the circumstances in which they had been obtained, would be given again, this time, in the presence of the assessors, and

(2) the failure of the defence to exercise their right to cross-examine all over again the prosecution witnesses, who had already testified on the *voire dire* in the absence of the assessors,

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the next question to be logically considered was whether, the learned Judge remained under an automatic duty to remind the prosecution of its duty, and Counsel for the defence of their corresponding right, as aforesaid.

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In our view, the learned Judge remainded under such a duty since it is not just of some importance, but of fundamental importance to the administration of criminal justice, that an accused person should feel that he has not been deprived of that priceless asset - namely a fair trial, notwithstanding the shortcomings of his Counsel. It is axiomatic that the primary duty of a Judge at any trial - whether criminal or civil - is to ensure that justice is done, no doubt, according to law.

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We then went on to consider the final question of critical substance which arose on this part of the case; namely: whether the failure of the prosecution, the defence and the learned Judge, to discharge their respective duties, as aforesaid, had occasioned a failure of justice.

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The expression "failure of justice" though mentioned in s. 422 of the Criminal Procedure Code is not defined therein for it provides:

> Irregularities not to vitiate proceedings.
>
> Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account -
>
> > of any error, omission or irregularity in the complaint, summons, warrant, charge, judgment or other proceedings before or during trial, or in any inquiry or other

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> proceeding under this Code; or of the want of any sanction required by s. 129; or of the omission to settle or revise of jurors or assessors; of the want of qualification of any juror or assessor; of the improper admission or rejection of any evidence; or of any misdirection in any charge to jurors or assessors;
>
> unless such error, omission, improper admission or rejection of evidence, irregularity, want or misdirection has occasioned a failure of justice.

The expression "miscarriage of justice" occurring in s. 6(1) of the New South Wales Criminal Appeal Act, 1912 (equivalent to our s. 422 of the Criminal Procedure Code), was construed by Fullagar J speaking for the High Court of Australia, in *Mraz v. the Queen* [1955] 93 CLR 493, at 514 in the following terms:

> It is very well established that the proviso to s. 6(1) does not mean that a convicted person, on an appeal under the Act, must show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried.

Similarly, the expression "failure of justice" occurring in s. 535(1) of the Indian Criminal Procedure Code (equivalent to our s. 422 of the Criminal Procedure Code) was construed by Hedge J in *Krishna Murthy v. Abdul Subban* [1965] 1 Cr. LL 565 at 576, in the following terms:

> The expression "a failure of justice has in fact been occasioned thereby" found in s. 535(l), Cr. PC does not connote that the Court should be of the opinion that an innocent person has been convicted or the case against the accused person is not made out beyond reasonable doubt. An accused person is entitled to be acquitted whether there was a fair trial or not if no case is made out against him. For that purpose the legislature need not have introduced the conception of "failure of justice" in ss. 535 and 537, Cr. PC. The "failure of justice" mentioned therein is that occasioned by the contravention of the provisions in Chapter XIX, Cr. PC. In law the expression "justice" comprehends not merely a just decision but also a fair trial. Sections 535 and 537, Cr. PC have primarily in view a fair trial. For the purpose of those sections a denial of fair trial is denial of justice. One of the contents of natural justice, which is so much valued, is the guarantee of a fair trial to an accused person. A fair trial is as important as a just decision. Neither the one nor the other can be sacrificed. Sacrifice of the one, in the generality of cases, is bound to lead to the sacrifice of the other. The two are closely interlinked.

The expression "failure of justice" is therefore, synonymous with the expression "miscarriage of justice".

In our view, therefore, the effect of the breaches of their respective duties imposed by law on the prosecution, the defence and the learned Judge, to which we have referred, was to sever an important artery of evidence from the consideration of the assessors, so far as the defence were concerned, thereby occasioning a failure of justice, within the meaning of s. 422 of the Criminal Procedure Code and the authorities to which we have referred and, on this ground alone, the convictions were unsustainable.

That, however, is not the end of the matter. There was a separate point - not raised by Counsel - which cropped up in the course of the argument, as a result of a question from the Court - namely, whether the convictions had been vitiated by the admission of certain evidence, which was irrelevant, inadmissible and gravely prejudicial; namely, evidence that at the material time, the appellants were seen fleeing from the scene of the crime in a **stolen station wagon.** This was plainly evidence which **could** imply that the appellants were men of bad character. That this evidence was inadmissible was plain beyond argument as, at no time, during the trial, was any attempt made by the defence to adduce evidence of the appellants' good character nor had any attempt been made by the defence to impugn the character of any of the prosecution witnesses (See s. 54 Evidence Act). Unfortunately, in the course of his summing up, the Judge did advert to this evidence as being evidence upon which the assessors could rely so that it could be readily assumed that the assessors must have been swayed by it. Admittedly, the defence had **not** objected to the admission of this evidence but this did **not** relieve the Judge of the duty of stopping the prosecution from adducing it, since inadmissible evidence does not become admissible simply by reason of failure to object.

However, having regard to our conclusion on the primary question of law regarding the procedure to be adopted if, after the *voire dire*, the challenge to the admissibility of the cautioned statements fails, it was unnecessary for us to express an opinion on the question of the effect of the admission of the inadmissible evidence on the convictions.

In the result, we had no option but to quash the convictions, set aside the sentences passed against the appellants, and order a retrial before a different Judge and different assessors. In the meanwhile, we had ordered that the appellants be remanded in custody pending their retrial.